A

Tetuan Mokhtar Ngah & Co (sued as a firm) v Kubu Pengkalan Sdn Bhd

B

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO T-02(NCVC)(W)-2297–10 OF 2013
ABDUL WAHAB PATAIL, DAVID WONG AND ABANG ISKANDAR JJCA
26 DECEMBER 2014

C

Civil Procedure — Action — Limitation period — Parties entered into sale and purchase agreement for land — Failure to comply with terms of sale and purchase agreement — Civil suit against respondent for vacant possession of land — Sanction from official receiver obtained to represent client — Application to set aside the judgment in default of defence — Whether limitation set in — Claim for professional negligence

D

The respondent/plaintiff had purchased a land ('the land') from Petra Jaya Food Industries Sdn Bhd ('the PJFI') and operated a *bihun*-producing factory located on the land ('the factory'). Due to a failure by the respondent/plaintiff to comply with the terms of the sale and purchase agreement with PJFI, the PJFI, through Tetuan Ubaidillah Aziz & Co ('the first defendant'), brought a civil suit against the plaintiff claiming, inter alia, vacant possession of the land on the basis that the PJFI was entitled to the possession of the land. However on 20 August 2001, the PJFI was wound up. The first defendant obtained a sanction from the official receiver to continue representing PJFI. On 14 August 2005, the first defendant obtained a judgment in default of defence against the plaintiff. The appellant/the second defendant took over the conduct of the 2001 suit. The appellant did not obtain a sanction from the official receiver ('OR') to continue handling the 2001 suit. However, the appellant acted on the instruction of the PJFI's director. The appellant filed writ of possession and enforced the said writ of possession on 9 July 2006. After getting the possession of the factory, the appellant did not hand over the possession of the factory to the PJFI then already managed by the OR, and the appellant also failed to maintain the upkeep of the factory reasonably. The respondent then filed an application to set aside the judgment in default of defence and the writ of possession, as well as to strike out the 2001 suit. The respondent's application which was initially dismissed by the senior assistant registrar was allowed. The respondent had served the order to the appellant but received no response. The respondent regained possession of the factory and found that the whole factory was in shambles. The factory was damaged, machine and materials were missing, and whatever machines that were left could no longer function or be used. The respondent filed this present civil suit against the defendants

E

F

G

H

I

claiming, inter alia, general and special damages of RM2,290,941 for professional negligence which caused the plaintiff to be chased out from the factory thereby denying them from operating the bihun-making factory, as well as for loss of business prospect. However, the claims against the first defendant was withdrawn. The High Court judge had allowed the respondent's claim against the appellant. Dissatisfied with the decision, the appellant filed this appeal to this court. Among the other issues raised by the appellant had been the issue of limitation or time bar.

Held, allowing the appeal:

(1) The trial judge had erred and misdirected himself by confining himself on the issue of lack of locus standi on the part of the appellant to act for the PJFI which had been wound up and in respect of which no sanction had been obtained by the appellant before it had so acted for the PJFI. When the respondent filed its cause papers against the appellant on 9 July 2012, limitation had set in thereby completely denying the entire substratum of the respondent claim by operation of law as contained under s 6 of the Limitation Act 1953 ('the Act') (see paras 21 & 37).

(2) The determination of the second issue, namely that of time-bar ought to be dealt with first, because in the event that this court was with the second defendant on this issue, the issue on whether the second defendant owed a duty of care to the plaintiff would be rendered, with respect, academic. This action was filed out of time against the second defendant. The effective date when time started to run could either be the 28 March 2006 or 17 April 2006. It cannot be the 9 July 2006 because that date was the occurrence of an event that was beyond the control of the appellant in the sense that it was an act emanating from the court. That date could not in any way be attributable to the appellant. That date therefore ought not to be considered in computing as to when time started to run for the purpose of establishing limitation (see paras 27 & 32).

(3) As between the two dates of 28 March 2006 and 17 April 2006, time began to run on 28 March 2006. It was what the respondent/plaintiff itself had indicated in its pleadings. This suit was filed out of time when the plaintiff only filed it on 9 July 2006. The effect of limitation on a suit so filed is fatal. It is similar to the rigor mortis having set in, it is irreversible and is beyond salvation. Such is the effect of s 6 of the Act (see paras 33 & 35).

[Bahasa Malaysia summary

Responden/plaintif telah membeli tanah ('tanah tersebut') daripada Petra Jaya Food Industries Sdn Bhd ('PJFI') dan menjalankan kilang mengeluarkan bihun yang terletak di atas tanah ('kilang'). Akibat kegagalan responden/plaintif untuk mematuhi dengan terma perjanjian jual beli dengan

PJFI, PJFI, melalui Tetuan Ubaidillah Aziz & Co ('defendan pertama'), membawa guaman sivil terhadap plaintif mendakwa, antara lain, milikan kosong tanah tersebut atas dasar bahawa PJFI berhak untuk milikan tanah tersebut. Walau bagaimanapun pada 20 Ogos 2001, PJFI digulung. Defendan pertama memperolehi sanksi daripada pegawai penerima untuk terus mewakili PJFI. Pada 14 Ogos 2005, defendan pertama memperolehi penghakiman ingkar pembelaan terhadap plaintif. Perayu/defendan kedua mengambil alih tindakan guaman 2001 tersebut. Perayu tidak memperolehi sansksi daripada pegawai penerima ('PP') untuk terus mengendali guaman 2001 tersebut. Walau bagaimanapun perayu bertindak ke atas arahan pengarah PJFI. Perayu memfailkan writ milikan dan menguatkuasakan writ milikan tersebut pada 9 Julai 2006. Selepas mendapatkan milikan kilang tersebut, perayu tidak memberikan milkan kilang kepada PJFI yang pada ketika itu diuruskan oleh PP, dan perayu juga gagal untuk mengekalkan senggaraan kilang tersebut dengan munasabah. Responden kemudiannya memfailkan permohonan untuk mengetepikan penghakiman ingkar pembelaan dan writ milikan, dan juga membatalkan guaman 2001 tersebut. Permohonan reponden yang pada mulanya ditolak oleh timbalan kanan pendaftar dibenarkan. Responden telah menyerahkan perintah kepada perayu tetapi tidak menerima jawapan. Responden mendapatkan kembali milikan kilang tersebut dan mendapati keseluruhan kilang tersebut menjadi kucar kacir. Kilang adalah rosak, mesin dan material hilang, dan apa-apa mesin yang tinggal tidak lagi berfungsi atau dapat digunakan. Responden memfailkan guaman sivil ini terhadap defendan-defendan menuntut, antara lain, ganti rugi am dan khas sebanyak RM2,290,941 untuk kecuaian profesional yang menyebabkan plaintif dihalau keluar daripada kilang tersebut dengan itu menafikan mereka daripada menjalankan kilang pengeluaran bihun, dan juga untuk kerugian prospek perniagaan. Walau bagaimanapun, tuntutan-tuntutan terhadap defendan pertama ditarik balik. Hakim Mahkamah Tinggi telah membenarkan tuntutan responden terhadap perayu. Tidak berpuas hati dengan keputusan, perayu memfailkan rayuan ini kepada mahkamah ini. Di antara isu-isu lain yang dibangkitkan oleh perayu adalah isu had masa atau had tempoh.

Diputuskan, membenarkan rayuan:

(1) Hakim perbicaraan telah tersilap dan salah arah dirinya dengan mengehadkan dirinya atas isu lokus standi bagi pihak perayu untuk bertindak bagi PJFI yang telah digulung dan berkaitan tiada sanksi yang telah diperolehi oleh perayu sebelum ia bertindak bagi pihak PJFI. Apabila responden memfailkan kertas kausanya terhadap perayu pada 9 Julai 2012, had masa telah ditetapkan dengan itu sama sekali menafikan keseluruhan substratum tuntutan responden melalui perjalanan undang-undang seperti yang terkandung di bawah s 6 Akta Had Masa 1953 ('Akta') (lihat perenggan 21 & 37).

(2) Penentuan isu kedua, iaitu bahawa had tempoh patut diuruskan

terdahulu, kerana jika mahkamah ini berpihak dengan defendan kedua atas isu ini, isu sama ada defendan kedua menanggung kewajipan berhati-hati kepada plaintif akan dijadikannya akademik. Tindakan ini difailkan di luar masa terhadap defendan kedua. Tarikh efektif bila masa bermula adalah sama ada 28 Mac 2006 atau 17 April 2006. Ia tidak boleh pada tarikh 9 Julai 2006 kerana tarikh tersebut adalah berlakunya kejadian yang melampaui kawalan perayu di mana ia adalah tindakan yang berpunca daripada mahkamah. Tarikh tersebut tidak patut dipertimbangkan dalam mengira bila masa bermula untuk tujuan membuktikan had masa (lihat perenggan 27 & 32).

(3) Di antara dua tarikh 28 Mac 2006 dan 17 April 2006, masa bermula pada 28 Mac 2006. Ia adalah apa yang ditunjukkan oleh responden/plaintif dalam plidingnya. Guaman ini difailkan di luar had masa apabila plaintif hanya memfailkannya pada 9 Julai 2006. Kesan had masa ke atas guaman yang difailkan adalah serius. Ia adalah sama kepada *rigor mortis* yang telah ditetapkan, ia tidak boleh ditarik balik dan tidak dapat diselamatkan. Ini adalah kesan s 6 Akta (lihat perenggan 33 &35).]

Notes

For cases on limitation period, see 2(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 205–213.

Cases referred to

Al- Kandari v J R Brown & Co [1988] QB 665, CA (refd)

Machinchang Skyways Sdn Bhd & Anor v Lembaga Pembangunan Langkawi & Anor and another appeal [2015] 2 MLJ 373; [2014] 1 LNS 1123, CA (refd)

Pang Yeow Chow (practising at Messrs YC Pang, Chong & Gordon) v Advance Specialist Treatment Engineering Sdn Bhd [2015] 1 MLJ 490; [2014] 8 CLJ 188, CA (refd)

Ronex Properties Ltd v John Laing Construction Ltd and others [1983] QB 393, CA (refd)

Legislation referred to

Limitation Act 1953 s 6

Appeal from: Civil Suit No 22NCVC-42–07 of 2012 (High Court, Kuala Terengganu)

Ranjit Singh (Hanif Idris & Assoc) for the appellant.

Abu Daud bin Abd Rahim (Hazira Fatiha Ismail with him) (Azmi & Assoc) for the respondent.

Abang Iskandar JCA (delivering judgment of the court):

BRIEF FACTS OF THE CASE

[1] The respondent/plaintiff, Kubu Pengkalan Sdn Bhd had purchased a land known as HS (M): 4634, No PT 7977 K, Kawasan Perindustrian Gong Badak, 21300 Kuala Terengganu, Terengganu ('the land') from Petra Jaya Food Industries Sdn Bhd ('the PJFI') and operated a bihun —producing factory (noodle) located on the land ('the factory') as at 18 February 2001.

[2] Due to a failure by the respondent/plaintiff to comply with the terms of the sale and purchase agreement with PJFI, the PJFI, through Tetuan Ubaidillah Aziz & Co ('the first defendant'), brought a Civil Suit No 22–09 of 2001 ('2001 suit') against the plaintiff claiming, inter alia, vacant possession of the land on the basis that the PJFI is entitled to the possession of the land. The suit was conducted by Encik Anuwar bin Ismail, from the first defendant.

[3] However on 20 August 2001, the PJFI was wound up. The first defendant obtained a sanction from the official receiver on 29 June 2005 to continue representing PJFI.

[4] On 14 August 2005, the first defendant obtained a judgment in default of defence against the plaintiff.

[5] Through a notice of change of solicitor, Tetuan Mokhtar Ngah & Co (the appellant/second defendant), took over the conduct of the 2001 suit from the first defendant pursuant to the change of workplace of Encik Anuwar bin Ismail from first defendant to the second defendant.

[6] The handling of 2001 suit by lawyer Encik Anuwar bin Ismail when he was practising at the second defendant was claimed to be in the knowledge and with the agreement of the sole proprietor of the second appellant at that point of time, Dato' Mokhtar bin Ngah.

[7] The appellant/second defendant did not obtain a sanction from the official receiver ('OR') to continue handling the 2001 suit on behalf of the PJFI. However, the appellant/second defendant acted on the instruction of the PJFI's director, Encik Salleh bin Embong.

[8] The appellant/second defendant filed writ of possession on 17 April 2006 and enforced the said writ of possession on 9 July 2006.

[9] After getting the possession of the factory, the appellant/second defendant did not hand over the possession of the factory to the PJFI then already managed by the OR, and the appellant/ second defendant also failed to maintain the upkeep of the factory reasonably. A

[10] On 8 September 2006, the respondent/plaintiff filed an application to set aside the judgment in default of defence and the writ of possession, as well as to strike out the 2001 suit. B

[11] The respondent's/plaintiff's application which was initially dismissed by the senior assistant registrar on 25 March 2007 was allowed by the learned trial judge on 16 March 2008. C

[12] The respondent/plaintiff had served the order dated 16 March 2008 to the appellant/ second defendant but received no response. D

[13] The respondent/plaintiff regained possession of the factory on 8 June 2009.

[14] After regaining possession of the factory, the respondent/plaintiff found that the whole factory was in shambles. The factory was damaged, machine and materials were missing, and whatever machines that were left could no longer function or be used. E

[15] On 9 July 2012, the respondent/plaintiff had filed this present civil suit against the defendants claiming, inter alia, general and special damages of RM2,290,941 for professional negligence in conducting the Civil Suit No 22-9-2001 which caused the plaintiff to be chased out from the factory thereby denying them from operating the bihun — making factory, as well as for loss of business prospect. However on 15 January 2013, the claims against the first defendant was withdrawn. F G

[16] The learned High Court judge had, on 10 September 2013 allowed the respondent's/plaintiff's claim against the appellant/second defendant. Dissatisfied with the decision, the appellant/second defendant filed this appeal to this court. H

[17] We had heard submissions of parties on 7 May 2014. After considering the submissions in the light of the records of appeal, we had on 8 May 2014, unanimously allowed this appeal with the cost of RM25,000 here and below. The order of the High Court dated 10 September 2013 was therefore set aside, and the deposit was refunded to the second defendant. We now proffer our grounds of judgment. I

A THE APPEAL BEFORE US

[18] Before proceeding any further, we would like to advert to the relevant parts of the judgment of the learned trial judge that pertains to the approach that he had undertaken in addressing the issues before him in this case. Having been aware of the issues that were raised before him, he had said at p 4, para 13 of his grounds of judgment as follows:

B

> Setelah meneliti keterangan saksi-saksi Plaintif dan Defendan-Defendan, membaca hujahan bertulis yang difailkan oleh kedua-dua pihak, saya mendapati isu utama dalam kes ini samada Defendan kedua mempunyai locus standi untuk mewakili Petra Jaya yang telah digulung sebelum memperolehi sanksi atau atau kebenaran daripada Jabatan Insolvensi Malaysia.

C

[19] He reiterated his approach at p 8 para 24 of this grounds of judgment where he said:

D

> Saya mendapati hujahan-hujahan tersebut adalah tidak bermerit dan langsung tidak menyentuh isu sanksi yang merupakan isu utama dalam kes ini. Ekoran dari itu, saya tidak akan mengupas dengan lebih lanjut setiap isu yang dibangkitkan dalam hujahan bertulis peguam defendan kedua.

E

[20] Among the other issues that were raised by the appellant/second defendant before the learned trial judge had been the issue of limitation or time bar.

F

[21] In the circumstances of this case therefore, we were of the view that the learned trial judge had erred and misdirected himself by confining himself on the issue of lack of locus standi on the part of the appellant/second defendant to act for the PJFI which had been wound up and in respect of which no sanction had been obtained by the appellant/ second defendant before it had so acted for the PJFI.

G

[22] At this juncture, it would be appropriate to look at the pleadings of the plaintiff/respondent and indeed the learned trial judge had extracted the part of the statement on negligence at p 4 para 30 of his grounds, as follows:

H

> Butir-butir kecuaian Defendan Kedua adalah seperti berikut:
>
> 30.1 Menerima arahan untuk mengambil alih pengendalian guaman 2001 tersebut daripada Lembaga Pengarah sebuah syarikat yang telah digulungkan;
>
> 30.2 Menjalankan arahan Lembaga Pengarah sebuah syarikat yang telah digulungkan;
>
> 30.3 Gagal untuk memelihara Kilang tersebut setelah mengambil milikan daripada Plaintiff; dan

I

30.4 gagal untuk menyerahkan milikan kilang tersebut yang diambil daripada Plaintif kepada Petra Jaya. A

[23] From the above-quoted sub-paragraphs in the statement of claim, it is clear the alleged negligent acts of the appellant/second defendant had been sufficiently pleaded. According to the learned trial judge: B

> Butir-butir kecuaian professional defendan kedua yang diplidkan oleh plaintif adalah sebagaimana di perenggan 30 penyata tuntutan iaitu: ...

[24] The particularised acts of negligence were as alluded to by us in the preceding paragraph above. C

[25] From sub-paras 30.1 and 30.2 it would appear that the complaints had been that the appellant/second defendant had been negligent in accepting to take over the 2001 suit from the board of directors of a wound up company that was PJFI and taking directions from it. It was also negligence on the part of the appellant/second defendant, according to the respondent/plaintiff when the former had failed to upkeep the factory and by not handing the factory to the PJFI after it was seized from the respondent/plaintiff. D E

[26] Before us, it was submitted by learned counsel for the appellant/second defendant two issues needed to be considered by this court in connection with this appeal. These issues had been: (a) whether or not the appellant/second defendant owed a duty of care to the plaintiff; and (b) whether the respondent/plaintiff was caught by limitation by virtue of s 6 of the Limitation Act 1953 and was therefore time-barred since the action that was filed by the respondent/plaintiff against the appellant/ second defendant was premised upon the tort of negligence. F G

[27] In our view, the determination of the second issue, namely that of time-bar ought to be dealt with first, because in the event that this court was with the second defendant on this issue, the first issue on whether the second defendant owed a duty of care to the plaintiff would be rendered, with respect, academic. H

[28] As such, having considered the submissions of both parties on the issue of limitation, we were in agreement with learned counsel for the appellant/second defendant that this action was filed out of time against the second defendant. I

[29] On the issue of limitation, it was impressed upon us that there could only be two dates which would be relevant for consideration. One such date was the 28 March 2006 and the other date being the 17 April 2006. The 28

March 2006 was the date on which the appellant/second defendant took over the conduct of the previous suit from Messrs Ubaidullah and Aziz & Co and the 17 April 2006 was the date on which the appellant/second defendant commenced enforcment proceedings, namely the writ of possession. This suit was filed in the High Court against the appellant/second defendant on the 9 of July 2012.

[30] For the respondent/plaintiff, the operative date must be on the 9 July 2006 which would make it just in time.

[31] But what was the date 9 July 2006 in the scheme of things in this case? From the evidence, the 9 July 2006 was the date on which the court bailiff took possession of the factory.

[32] Having considered the submissions of parties relating to what is essentially a point of law, we agreed with the learned counsel for the appellant/second defendant that the effective date when time started to run could either be the 28 March 2006 or the 17 April 2006. We also agreed that it cannot be the 9 July 2006 because that date was the occurrence of an event that was beyond the control of the appellant/second defendant in the sense that it was an act emanating from the court. So, that date could not in any way be attributable to the appellant/second defendant. That date therefore ought not to be considered in computing as to when time started to run for the purpose of establishing limitation.

[33] Having said that, as between the two dates of 28 March 2006 and 17 April 2006, we were of the view that time began to run on 28 March 2006. We came to that decision because it was what the respondent/plaintiff itself had indicated in the sub-para 30.1 of its pleadings. For ease of reference, we reproduce that sub-paragraph below:

> 30.1 Menerima arahan untuk mengambil alih pengendalian guaman 2001 tersebut daripada Lembaga Pengarah sebuah syarikat yang telah digulungkan.

[34] According to the respondent/plaintiff, that sub-para 30.1 represented one of the particulars of the alleged professional negligence committed by the appellant/second defendant. It was beyond dispute that the date when that alleged negligent act had fallen on the 28 March 2006. It is trite that the limitation period begins to run from the date on which the claimant's cause of action accrued. In our instant appeal, the negligent act on the part of the appellant/second defendant as alleged by the respondent/plaintiff in sub-para 30.1 had occurred on the 28 March 2006. That was the date that the cause of action to sue for negligence had accrued and that time started to run for the purpose of establishing limitation from that date until it had run its course for six years.

[35] As such, that being the case, there was merit in the contention of the appellant/second defendant for stating that this suit was filed out of time when the plaintiff only filed it on 9 July 2006. The effect of limitation on a suit so filed is fatal. It is similar to the *rigor mortis* having set in, it is irreversible and is beyond salvation. Such is the effect of s 6 of the Limitation Act 1053.

[36] *Mozley and Whitley's Law Dictionary* explains the term more clearly by saying that 'a statute of limitations is one which provides that no court shall entertain proceedings for the enforcement of certain rights if such proceedings were set on foot after a lapse of a definite period of time reckoned as a rule from the violation of the right'. The law of limitations therefore places a limit in terms of the time frame within which a person who wishes to commence a legal action against another must act. If action is not so instituted, the right to sue is forever lost. It was therefore unfortunate that the plaintiff had filed in the claim for negligence, being a tort, only after limitation had set in. See generally the cases of *Ronex Properties Ltd v John Laing Construction Ltd and others* [1983] QB 398; *Machinchang Skyways Sdn Bhd & Anor v Lembaga Pembangunan Langkawi & Anor and another appeal* [2015] 2 MLJ 373; [2014] 1 LNS 1123; *Pang Yeow Chow (practising at Messrs YC Pang, Chong & Gordon) v Advance Specialist Treatment Engineering Sdn Bhd* [2015] 1 MLJ 490; [2014] 8 CLJ 188.

[37] On this ground alone, it is very clear that when the respondent/plaintiff filed its cause papers against the appellant/second defendant on 9 July 2012, limitation had set in thereby completely denying the entire substratum of the respondent/plaintiff's claim by operation of law as contained under s 6 of the Limitation Act 1953. As such, the appeal by the appellant/second defendant ought to succeed and we had so held.

[38] In the upshot, it had become unnecessary for us to consider the issue on negligence as pleaded by the plaintiff. Be that as it may, we noted that in his grounds of judgment it was not explained as to how the duty of care was owed by the appellant/second defendant to the respondent/plaintiff, bearing in mind that there were opponents in litigation. We agreed with learned counsel for the appellant/second defendant that no duty was owed by his client to the respondent/plaintiff in the circumstances of this case. Definitely, by not getting the sanction from the Insolvency Department did not in itself amount to an act of professional negligence on part of the appellant/second defendant from which the respondent/plaintiff could claim damages for alleged losses. The circumstances in this case did not bring it to be within the exception to the general rule that no duty of care exists between opponents in litigation. The exceptions are circumscribed and limited in scope.

[39] One such example of where a solicitor was held to owe a duty of care to the plaintiff was where the defendant's solicitors, by virtue of it agreeing to hold its (opponent) client's passport to the order of the court, thereby stepping outside their role as solicitors for the defendant (see the case of *Al- Kandari v J R Brown & Co* [1988] QB 665). No such similar factual circumstance had existed in our present appeal.

[40] Premised on the above, we had allowed this appeal with costs of RM25,000 here and below, to the appellant/second defendant as the successful appellant. The order of the High Court dated 10 September 2013 is therefore set aside, and we had also ordered that the deposit be refunded to it. We had so ordered on the 8 May 2014.

Appeal allowed.

Reported by Afiq Mohamad Noor